Supreme Court, U.S.
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In The

Supreme Court of the United States

In re DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

ON PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ORIGINAL JOINT PETITION FOR WRIT OF MANDAMUS

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Questions on Appeal (Discretionary Review) Preserved via Mandamus

1. What does *defraud* mean?

2. Does 18 U.S.C. § 371 (defraud) alter that definition?

3. Under the present reorganization, do substantive and procedural due process still exist?

4. Is a Klein conspiracy, by this or any other of its wordings, statutory?

5. Where the executive authority purports to create the "criminal" "statute," is there a violation of separation of powers?

6. Does a non-statutory charge carry any "lesser included's" with it?

7. Does Plaintiff–Appellee–Respondent have standing to complain of matters defined, in whole or in part, by 18 U.S.C. § 371?

8. Can joinder ever occur with a party that lacks standing?

9. When is joinder "final?"

   A. Where there's a plea, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected at allocution?

   B. If the signing of the "plea agreement" is the (last) time to "object or waive" regarding joinder, does joinder exist where the "agreement" is (facially) self-breaching?

C. Where there's a trial, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected as late as allocution, or is joinder irrebuttably resolved at the start of trial?

D. Is disclaimer, arising from asserting the preference for extinguishment as distinct from discharge, a matter of venue or personal jurisdiction, i.e, subject to threshold waiver or estoppel, thus a waste of time to raise thereafter, or of subject matter jurisdiction?

10. Does an indictment that charges criminally the non-payment of FICA or FUTA seek to reinstate "debtor's prison?"

11. Under *Erie* and the proprietorship doctrine, as they pertain to the special maritime and territorial jurisdiction,

    A. does federal public trust policy preempt state public trust policy, for purposes of any of 28 U.S.C. § 3002(15)(a), (b) or (c), outside an area that qualifies under 40 U.S.C. §§ 255, 3111 or 3112?

    B. if part A is answered in the negative, even where the forum is proper, and even where the benefits exist from both public trusts, and even where something substantial moves in commerce so as to satisfy 18 U.S.C. § 8, doesn't the choice of law analysis still favor the state public trust policy, *especially* for an indictment?

    C. even if that state's public policy doesn't apply, doesn't a "taxpayer" have access to the State's original statutory law and common law via 28 U.S.C. § 1333(1) (saving to suitors)?

12. Under Federal Rule of Criminal Procedure 11 ("Rule 11"), is a plea properly set aside where the "plea agreement" is (facially) self-breaching?

13. Under Rule 32(e), is a plea properly set aside where the "plea agreement"

    A. charges usurious interest?

    B. seeks to reinstate "debtor's prison?"

    C. charges *defrauding* but establishes not one penny's worth of property "wrongfully *acquired*?"

    D. seeks to impose sentence upon (*multiple*) allegedly *dismissed* counts?

    E. if there is a lesser included offense in Count One, at all,

        1. confirms, by its own terms, the wholesale and perpetual onslaught of fiduciary abuse?

        2. asserts a claim sounding in trust, but fails even to allege, much less prove, any beneficiary?

        3. attributes to an individual "gross income" that is not any individual's, but rather is that of an unindicted entity?

        4. holds as liable an alleged "responsible party" where no threshold liability in any entity is even alleged, much less proved?

        5. fails to establish any "tax deficiency" in any individual?

6. fails to establish any set of convictions to satisfy the term "corruptly?"

7. asserts and confirms a position so inconsistent with the presumed role as to amount to disclaimer?

F. arises from the same mistake of fact resulting from ignorance of the law that applies to the case, generally?

14. Can the advisory panel's opinion be sustained where there is no evidence of

A. defrauding (wrongful *acquisition*)?

B. "tax deficiency"
1. in any business entity?
2. in any individual?

15. Can the advisory panel's opinion be sustained where the definition of *defraud* in the charge is not the proper definition?

16. Does the "judgment" that orders no restitution confess, judicially, the complete absence of any *defrauding*?

17. Where there is no § 7201 (*payment*) case (for there is no assessment), is there any authority for any payment mandamus?

18. Where there is a "plea agreement," can a "judgment" stand, where the Counts that form the basis for the "judgment" are the very same as those agreed to be dismissed?

19. Where there is a trial, can a "judgment" stand, where the Counts that form the basis for the "judgment"

were dismissed and never tried?

20. Can a "judgment" stand, where the indictment charges the party as a conspirator but he is sentenced as a principal?

21. Can either one of two related "judgments" stand, where, between them, they charge "double taxation?"

22. Can either one of two related "judgments" stand, where, between them, they create "simultaneous double jeopardy?"

Questions Raised for and by this Mandamus

A. Is the writ in aid of this Court's appellate jurisdiction?

B. Are these facts and circumstances exceptional enough to warrant this Court's exercise of its discretionary power?

C. Is there no other remedy available, or from some other court?

D. May Fleming approach this Court, in this new phase of this proceeding, *pro se*? (Fleming)

E. Is there a limited exception to *Anders* (general rule: the appointed attorney's *only* "out" is a frivolous appeal) derived by balancing the limited right to selfrepresentation on direct appeal with a guaranteed right to due process (procedural and substantive)? (Fleming)

F. Given that there should be an exception, is there a way constructively to fashion a remedy, shy of mandamus, that allows a cure for this sort of rejudice-causing deficiency accompanied by abandonment? (Fleming)

G. Where *Strickland* provides the standard, do these facts and circumstances establish sufficient prejudice-causing deficiency such that mandamus may issue to grant counsel's second motion to withdraw while preserving the appeal? (Fleming)

H. Does mandamus exist to encourage the appellate clerk to recognize the amended notice of appeal and allow Fleming to proceed *pro se* on direct appeal? (Fleming)

I. Does *Mickens* apply at the appellate level? (Fleming)

J. Where there is no factual or legal basis for the sole Count tried, thus, where substantive due process is violated from the threshold, and then throughout, on what possible basis is Arnold legitimately denied release pending appeal? (Arnold)

K. (To preserve the Point.) Where Arnold and Evans were tried in the same trial, on the same Count in the same Indictment, and where the appellate court joined the two appeals, but where the ends of justice are now thwarted by continuing that combined appeal, does mandamus exist to encourage the severance of those two appeals? (Arnold)

L. Where the issue of Fleming's release pending appeal is not before the appellate court because (1) Fleming is unable to access the courts directly, and (2)

prejudice-causing deficiency, then is Fleming entitled to raise that issue in this forum for the first time? (Fleming)

M. Where Fleming's incarceration stems from the very same Count in the very same indictment as Arnold's incarceration, on what possible basis is Fleming legitimately denied release pending appeal? (Fleming)

N. Where Fleming is able to proceed *pro se* in this Court, is he also now recognized *pro se* in the lower courts for matters that are properly addressed there in the normal course? (Fleming)

Parties

Because the objective in equity is to provide notice to all affected parties in order to obtain a complete judgment, service is made on the Solicitor General, with whom it shall be a privilege to work through this matter, per Rule 29.4, as the authorized agent in relation to this forum for all of the following interested or potentially interested parties:

United States Court of Appeals for the Eleventh Circuit, generally
(Re: Case Nos. [Fleming–same case] 03-12283-D, 03-12283-DD,* 03-12283,** [Arnold–same case] 03-12810-D, 03-12810-DD,* 03-12810**)
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

The Honorable Justice Carnes (Fleming and Arnold)
The Honorable Justice Hull (Rehearing on Arnold's motion)
Thomas K. Kahn, Clerk

United States District Court for the
Middle District of Florida, generally
(Re: Docket Nos. 3:00-cr-262-J-20HTS, 3:00-cr-262-J-20A)
300 North Hogan Street, Suite 9-150
Jacksonville, Florida 32202
Sheryl L. Loesch, Clerk

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* A result of inadvertent non-territorial recognition

** A result of "overruling" the reservation of defenses that followed from the first modification. (The courts and clerks have shown great patience.)

Robert E. McFadden, Warden
Federal Correctional Institute
2600 US Highway 301 South
Jesup, Georgia 31599

M. Pettiford, Warden
Federal Correctional Institute
2225 Haley Barbour Parkway
Yazoo City, Mississippi 39194

United States (UNITED STATES)

United States of America (UNITED STATES OF AMERICA)

Government of the United States (GOVERNMENT OF THE UNITED STATES)

United States Government (UNITED STATES GOVERNMENT)

government of the District of Columbia (GOVERNMENT OF THE DISTRICT OF COLUMBIA)

Additional parties.
On appeal from this same indictment:
Joseph Evans (presently, the same case on appeal as Arnold)
Michael Bloomquist (separate trial, separate case on appeal)

Subject to same matter, but separated from the indictment and not on appeal:
Joyce Fleming (a very recent mild heart attack patient)

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Appendix A (Fleming)

Appendix B (Arnold)

(References to 1 App., 2 App., 3 App. and 4 App. are references to the Appendices filed in the 11th Circuit.)

Citations to decisions below: None

Jurisdiction

(i) Order regarding Fleming, dated 15 December A.D. 2003
(ii) Order (on rehearing) regarding Arnold, dated 4 December A.D. 2003
(iii) NA
(iv) 28 U.S.C. § 1651(a).
(v) No "constitutional" questions.

Statutory Provisions Relevant to Mandamus

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. 18 U.S.C. § 371.

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution. IRC § 7201.

Section 7212(a). Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title,

shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

IRC § 7212(a) (Source–16 Aug 1954, ch. 736, 68A Stat. 855). *Cf. Klein*, 247 F.2d at 910-11 (superceding indictment 17 Sep 1954).

Statement of the Case

Generally.

Even Klein didn't commit a Klein conspiracy!

Fleming's advertising business specialized in (rush hour) "traffic report" radio and TV spots for the Greater Jacksonville, Florida community. Arnold was a limited partner in a partnership that purchased the business.

The Indictment started with ten defendants and 19 Counts. For both Fleming and Arnold, all other relevant Counts except the Klein conspiracy were "dismissed." There is no statute defining a Klein conspiracy. It was a sick joke when first concocted in 1954, and, as with swamp gas, its gagging stench has not improved with age. Presume a unit of account. There's not one penny's worth of property even alleged to be wrongfully *acquired*, by any of the ten, from anyone or anything, at any time, period. No evidence of *defrauding* supports the "plea agreement" (Fleming) or the advisory panel's opinion (Arnold).

If a non-statutory, therefore non-existent, offense carries "lesser included's," then the lesser included offenses would be IRC §§ 7201 and 7212 (omnibus). There is no allegation or evidence of (1) any "tax deficiency," for any business entity or any individual or (2) "corruptly," for there is only one offense charged.

Additionally, to fabricate the figures alleged, the prosecution ran roughshod over the business entity (a business trust), annihilating that fiduciary entity. Then the prosecution sought to rewrite the entire structure, reassigning both legal and equitable interests at their pleasure and convenience. By so doing, plaintiff cannot more blatantly have disclaimed the entire beneficial interest in the entire matter.

To flaunt the ramshackle spectacle, "sentencing" blazed new paths. "Sentencing" imposed sentence for DISMISSED Counts; created and punished charges nowhere found in the indictment, and punished criminally mere debts, thus reestablishing "debtor's prison." Where there is no assessment, there is no *payment* case, yet payment mandamus exists. And, by managing to seduce the trial court into imposing "double taxation," plaintiff also seduced the trial court into imposing simultaneous double jeopardy. In sum, between asserting the wrong legal theory (larceny by trick, in an "embezzlement" fact pattern) from the threshold, charging the wrong parties, alleging no facts to support *defrauding* or "tax deficiency," proving no facts to support *defrauding* or "tax deficiency," proposing a facially self-breaching "plea agreement," sentencing a "conspirator" as a principal, sentencing DISMISSED Counts, sentencing for charges nowhere found in the Indictment, imposing "double taxation" and thereby creating a simultaneous double jeopardy fiasco, plaintiff has not one single thing about this case "right." Not one.

Mandamus, Specifically.

Yet, none of these problems offends Fleming's appointed counsel. But for Fleming's appointed counsel's *refusal* to assert Fleming's defenses, objections and positions, at trial (allocution, sentencing) and on appeal, Fleming very well may not have suffered loss of liberty, at all. Counsel chose to remain on the case during the *Mickens* inquiry, yet after not one but two tries to withdraw on appeal, accompanied by his complete

abandonment of Fleming, it's clear he's changed his mind. Since the prejudice-causing deficiency spans both trial and appellate efforts, Fleming's mandamus focuses on identifying a limited exception to *Anders*, forged by balancing the limited right of self-representation on direct appeal with the unlimited right of substantive and procedural due process, such that counsel's *second* motion to withdraw may be GRANTED, and yet allow Fleming to pursue his appeal *pro se*.

Finally, there being no facts or law on this Record justifying *anything* in the way of incarceration of Arnold or Fleming (or anyone else, for that matter), each seeks release pending appeal. Arnold's efforts have been denied, and Fleming's counsel didn't even get them started.

All of this intends to be *pro se*, by whatever qualified right of self-representation exists in this forum. No "benefit" of attorneys in or for this new phase accepted.

Fleming's Writ

Remedies Requested.

THE REPRESENTATION ISSUE. Fleming requests a writ of mandamus to the appellate court to *grant* appointed counsel's second motion to withdraw and either to (1) allow Fleming to exercise his limited right to self-representation on direct appeal or (2) appoint substitute counsel. Alternatively, a writ to the clerk to allow as filed Fleming's waiver of right to counsel would accomplish the purpose. Also available is a writ fashioned around the First Amended Notice of Appeal, which intends to correct any clerical error or oversight in the original Notice of Appeal.

THE *MICKENS* ISSUE. Fleming requests a writ of mandamus to the appellate court clerk to file his *Mickens* Affidavit.

THE RELEASE PENDING APPEAL ISSUE. Fleming requests a writ of mandamus to the warden to release Fleming pending conclusion of the appellate (and any subsequent review) process.

Overview.

THE REPRESENTATION ISSUE. The problems stem from denial of procedural due process (no meaningful opportunity to be heard on appeal) and of substantive due process (instrumentality of this state *refusing* to assert Fleming's defenses, objections and positions), both of which follow from prejudice-causing deficiency.

THE *MICKENS* ISSUE. This, too, sounds in both procedural and substantive due process. The clerk did not allow Fleming to file his *Mickens* Affidavit. Substantively, the clerk has disallowed the inclusion in the Record of facts indispensably vital to the foundational operations of the judicial process. Therefore, procedurally, Fleming is denied a meaningful opportunity to be heard regarding such conflict of interest. Does *Mickens* apply on appeal? Where *Mickens* applies on appeal, does

mandamus apply to encourage the clerk to file that Affidavit of conflict of interest with the Record on appeal?

Is this a matter of styling of the document, or is it a matter of representation? Where the document is properly refused for styling problems, *Mickens* wouldn't necessarily apply. Where a more appropriately styled document should be allowed filed, *Mickens* should be extended to appellate matters. If the issue, though, is, as stated on the denial letter, that a *represented party* cannot put the appellate court on notice of such a conflict, meaning that the only people on the face of the planet who would ever need to present such information are prohibited from doing so, then *Mickens must* be extended to appellate matters.

THE RELEASE PENDING APPEAL ISSUE. Count One has neither statutory nor factual basis. It justifies incarceration of no one in this matter. Fleming has no meaningful access to the trial court by which to file his motion for release pending appeal, and appointed counsel has not done so. May Fleming raise that issue here? If not, is Fleming now *pro se* for all purposes so that he may now start that process?

Discussion.

A. In Aid of the Court's Appellate Jurisdiction. Granting the writ will preserve the Questions identified. It is crystal clear that appointed counsel has zero intention of representing Fleming's defenses, objections or positions in or to the trial or appellate courts. Therefore, since this Court does not generally entertain matters not previously presented to the appellate court, *Adickes*, 398 U.S. at 147, n.2 (and cases cited therein), *Moore*, 408 U.S. at 799, *Roberts*, 525 U. S. at 253-54, if Fleming is not allowed to assert those matters on appeal, those issues will be beyond this Court's authority to reach. Further, Fleming could be estopped from raising them in habeas proceedings. "The background for our discussion is the general rule that claims not raised on direct appeal may not be

raised on collateral review unless the petitioner shows cause and prejudice. *See* [*Frady*, 456 U.S. at 167-68; *Bousley*, 523 U.S. at 621-22.]" *Massaro*, 123 S.Ct. at 1693.

B Exceptional Circumstances. The detailed history of the client-attorney relationship is recounted in the notice of waiver. (App. A–Notice of Waiver). In sum, at trial, Fleming exercised self-representation, but sought counsel, via an "emergency," for sentencing. (*Id.* at 3). Fleming gave notice of Record at the trial level of the major conflict of interest that arose, as well as notice of termination of the client-attorney relationship. (*Id.* at 3-4). The Notice of Appeal intended to communicate the severance of that relationship for purposes of the appeal, which Notice appointed counsel had no intention of filing, hence filed by Fleming personally. Obviously, that original Notice failed to accomplish that purpose.

For Fleming to have to wait, in jail, for *five solid months* on an attorney,

- who *objected to* Fleming's assertion of his defenses, objections and positions, via Affidavit for purposes of allocution in the first place,
- who *refused* to assert Fleming's defenses, objections and positions at allocution,
- but who wanted to stay on the case for the sentencing phase,
- but who had no intention of filing an appeal,
- or any intention to request release pending appeal,
- who then *refused* to accept phone calls from Fleming, the incarcerated client,
- who *refused* to correspond with Fleming, the incarcerated client,[1]

(*see* App. A–Notice of Waiver, *Mickens* Affidavit), to file a 14-page, two-issue *Anders* brief, (App. A–counsel's brief) (by which second motion to withdraw Fleming at least then had formal access to the court), but who *refuses*,

[1] Fleming received counsel's *Anders* brief and copies of some transcripts.

even after reading Fleming's Brief, etc., to start release pending appeal procedures so as to have that issue before the appellate court, is reprehensible and absolutely and completely inexcusable.

Admittedly, this perspective is enhanced by such facts and circumstances as

- the facial inadequacy of the Indictment,
- prosecutorial numerics that scream for a competent tax accountant, not the least of which problems, which one need not have much familiarity with the "tax system" to recognize, is the criminal charging of both husband and wife, but charging "tax" to the husband (on the income of a completely separate, never indicted, never charged business entity) at MARRIED FILING SEPARATE rates,
- the reinstigation of "debtor's prison,"
- the resoundingly self-breaching nature of the "plea agreement,"
- sentencing based squarely and solely on DISMISSED counts,
- a confused payment mandamus in the stark absence of any assessment, thus in the absence of any "payment" charge or case,
- the charging of "double taxation" (Fleming and Arnold) and
- the subjugation to "simultaneous double jeopardy" (Fleming and Arnold),

(*see* Arnold's Brief, Fleming's Response to Counsel's Second Motion to Withdraw ("Fleming's Brief"), App. A–*Mickens* Affidavit, App. B–Arnold's (Fourth) Motion for Release Pending Appeal, Arnold's Second Motion to Reconsider), not one of which points does appointed counsel view as even cognizable to argue. (App. A–*Mickens* Affidavit, counsel's brief). At the time of sentencing, counsel did not even consider a "plea agreement"-based "judgment" appealable, despite hearing by his own ears, in person, as spoken by the trial judge, in open court, the clear instruction to Fleming that he had 10 days to appeal the "judgment." (*Id.–Mickens*

Affidavit)[2] This set of facts and circumstances exemplifies the definition of prejudice-causing deficiency.

To add to the uniqueness, the appellate clerk originally declined to file Fleming's Brief, (App. A–Clerk's Letter (6 Jun 2003)), because he was allegedly represented. Then, the clerk filed and the court ruled on a *pro se* motion, (App. A–Order (8 July 2003)). Since then, the clerk has refused to file anything submitted by Fleming, even his *Mickens* Affidavit. (App. A–Clerk's Letter (25 Sep 2003)). Boddie sought a marital divorce, rather similar to the professional one at issue here, and he faced a similar problem. *Boddie* (not allowed to file his pleadings).

Regarding counsel's second motion to withdraw, the appellate court issued it's ruling on 15 December 2003. (App. A–Order (15 Dec 2003)). The rather thorough opinion listed several different transcripts not yet addressed. There still being no communication with appointed counsel, Fleming personally requested those transcripts. Nonetheless, still looming is the completely open-ended nature of the schedule. Fleming has zero meaningful access to the appellate court, and appointed counsel has no deadline by which to produce yet a third motion to withdraw or to produce a brief. There are still no communications with counsel.

C. <u>This Court. This Remedy.</u> Regarding available courts, since this problem arises in the appellate court, on direct appeal, and since Fleming presently has no access to that court, there is no alternative forum by which to preserve the appeal.

Regarding alternative remedies, Fleming has very recently submitted a First Amended Notice of Appeal, (App. A–Amended Notice) to attempt to correct the threshold clerical error of the original Notice, (App. A–Original Notice). It has been returned, and since self-

[2] This Affidavit was both not allowed filed and not responded to.

representation on direct appeal being a qualified right, intervention by this Court is necessary to resolve the issue.

The objective is simply to be heard, meaningfully, on direct appeal. For this, there exists no adequate remedy "at law." Further, since the appellate court has denied both motions to withdraw, no other remedy "in equity" exists. Assume some other remedy existed. Fleming still has no meaningful way to activate it.

While substitution of counsel is one option, the practical way Fleming will be heard meaningfully on direct appeal is through self-representation.

D. Entering This Phase Pro Se. Fleming fully intends to enter into this phase *pro se*. Fleming waives all rights to representation. (Arnold is already *pro se*.)

E. Balancing Rights to Forge Limited Exception to *Anders*. The general rule from *Anders* is that the appointed counsel's (only) way out of the case is establishing that the appeal is frivolous. *Anders*. That's impossible to establish here. Further, where appointed counsel wants off the case after all, in fact so badly as to ask twice, and where he need only edit the signature page on Fleming's brief, sign it, and thereby submit Fleming's appeal, or, at worst, copy the entire brief with the appropriate edits for *authorized* authorship, and yet where he is again doing *nothing*, for *nine to ten months, now*, asserting none, zero, zilch, nada, of the *numerous* substantive points in the case, there *must* be a limited exception to *Anders*. There *must* be an exception that allows the issues and the party to proceed while simultaneously allowing the attorney to disembark.

Fleming here looks to procedural and substantive due process, both of which follow from prejudice-causing deficiency, as the basis for that limited exception. "In light of our conclusion that the Sixth Amendment does not apply to appellate proceedings, any individual right to self-representation on appeal based on autonomy

principles must be grounded in the Due Process Clause." *Martinez*, 528 U.S. at 161. "In both trials and appeals there are, without question, cases in which counsel's performance is ineffective. Even in those cases, however, it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself." *Id.* However, where the client *preserves* his position, including the Due Process issues, and where counsel *jeopardizes* the client's position, including the Due Process issues, this presumption must be considered rebutted. Procedurally, *with* appointed counsel, Fleming is unquestionably being denied a meaningful opportunity to be heard, first at trial (allocution) and now on appeal. (Procedurally, the clerk has denied Fleming a meaningful opportunity to be heard by refusing to file his *Mickens* Affidavit.) Substantively, Fleming has been "counseled," by an instrumentality of this state, in all practical effect, out of a trial (via *refusal* to assert Fleming's defenses, objections and positions at allocution), and now, by that same instrumentality, out of his appeal. (Substantively, and in light of Equal Protection, regarding the *Mickens* Affidavit, Fleming, in his capacity as client, thus also as witness, has been denied access to the court under color of law regarding his own case.)

On the one hand, self-representation on direct appeal is qualified. *Martinez*. On the other hand, obtaining a meaningful opportunity to be heard is guaranteed and unqualified. *Trombetta*, 467 U.S. at 485; *Strickland*, 466 U.S. at 684-85; *In re Oliver*, 333 U.S. at 273; *Grannis*, 234 U.S. at 394. These are at odds with one another in this matter. Since one of the chief purposes for having appointed counsel must be to facilitate, not thwart, a party's meaningful opportunity to be heard, *Lassiter* (civil matter, indigency, no ultimate appointment of counsel, but analysis of majority and dissenting opinions sounds in Due Process and meaningful opportunity to be heard), it follows that unqualified, guaranteed due process interests must take precedence over the qualified right to

self-representation on direct appeal. While this state has matured since *Powell* (1932), *Gideon* (1963), and *Douglas* (1963), so has the commonwealth. In fact, we'd be missing the very heart of the balance of rights point here to fail to see the latter as anything other than a pure self-defense response to the former.

In sum, where counsel's deficiency is so prejudicial that it (1) obliterates the client's ability to obtain a meaningful opportunity to be heard, and (2) actually amounts to a substantive denial of access to the courts, then self-representation must be available at trial and on appeal. Even if the phase is entered *with* counsel, thus, even "mid-phase," where the defendant's meaningful opportunity to be heard is jeopardized, a remedy must exist to protect that Due Process interest. Where the self-representation standard is satisfied, and where that desire is made manifest in the Record, it must be an available option, even on direct appeal.

F. Future Cases. Where a party submits an appellate brief and appendices, which substantially comply with the appellate rules, within 40 days after the trial judgment, chances are good the party is in a position to comport with the rules and standards that apply to and for the appellate process. Where the party exercises self-representation at the trial level, and where, for whatever reason, representation resumes, and with the same attorney from whom the client sought independence and self-representation in the first place, which resumed relationship leads to a major conflict of interest due to the attorney's *refusal* to assert the party's defenses, objections and positions, which conflict is raised of Record, thus, where the Record is abundantly clear that the sole reason self-representation on appeal didn't materialize is due to a clerical error in the original Notice of Appeal, which Notice had to be filed by the client, because the attorney had no intention of filing it, then the party should be allowed to correct that clerical error and enjoy the right of self-representation on direct appeal.

Thus, where an amended notice of appeal will solve the problem. as has been filed here, then such procedural step is properly included in the remedy. Where a party's waiver of representation and assertion of self-representation in the appellate Record should be allowed filed, which Fleming's was not, then such procedural step is properly part of the remedy. Where a party's notice of conflict of interest, as per *Mickens*, and ineffective assistance of counsel, must be allowed filed in the appellate court, which Fleming's was not, then such procedural step is properly part of the remedy.

G. Prejudice-Causing Deficiency. *Strickland* provides the standard by which to evaluate both the deficiency and its prejudicial character. This Record shows the conflict of interest starting with allocution and sentencing, continuing through two motions to withdraw, and, thus, to today.

(1) Is there a deficiency? (2) Has that deficiency caused adverse prejudice?

(1) But for counsel's *refusal* to assert Fleming's defenses, objections and positions at the trial level, and his *refusal* to remove himself from the case at that stage, in addition to his *refusal* to assert the Notice of Appeal (which may or may not have contained the clerical error), coupled with two appellate motions to withdraw, exacerbated by his *refusal* to argue Fleming's defenses, objections and positions on appeal, even after *Fleming* prepared the brief and the appendices, Fleming's facts and arguments would at least be of Record by operation of the normal process. Thus, but for counsel's deliberate acts antagonistic to Fleming's position, that information would at least be available for appellate review, which would satisfy Fleming that he'd at least have a meaningful opportunity to be heard. At present, such opportunity is completely denied and foreclosed. Thus, deficiency exists. Further, it cannot be held against Fleming that he's carried the ball as far as he can. He shouldn't have to experience the slammed shut door on

the appeal via a final order in order to establish deficiency.

(2) Fleming is content to take responsibility for his understanding of his case, come what may, regardless of who argues it. But, to *have* a case and then to have it sabotaged by an attorney who *refuses* to argue it, at both levels, trial and appeal, is to experience prejudice caused by the deficiency. But for Fleming's Affidavit at trial, his defenses, objections and positions would not even be of Record at trial. But for Fleming's Brief and additional documents on appeal, his defenses, objections and positions would not even be available to be of Record on appeal. So, if Fleming had waited or depended upon counsel, *at all*, this particular discussion would not even be possible to entertain, much less engage.

Jettison is a proper remedy for common peril. *The Jason* (1912); *The G R Booth* (1898); Jonah 1:4-6, 11-12, 15 (c. 862 B.C.). Regarding decision authority, see *The J. P. Donaldson*, 167 U.S. at 604-05 (the captain of the barge under tow decides when the tug shall be cut loose, not the captain of the tug).

H. Amended Notice of Appeal. Allowing amendment of the Notice would provide a simply and effective procedural remedy. *See* Fed. R. App. P. 4(B)(ii).

I. *Mickens.* If the practical upshot of the problem here were a caption or style problem, then it's arguably not a *Mickens* problem. But, the clerk's letter clearly and specifically states that the reason for not filing Fleming's *Mickens* Affidavit is that he's represented. (App. A– Clerk's Letter (25 Sep 2003)). Thus, the only class of people, and the entire class of people, who could ever possibly *need* to raise *that* point of Record is the very class presently prevented from doing so.

Mickens is properly extended to apply to the appellate process.

L. Raising Fleming's Release Pending Appeal Here. This incorporates the discussion in J., *infra*.

In the normal course, Fleming would have filed the traditional motion for release with the trial court. However, Fleming has no direct or meaningful access to the trial court, and appointed counsel has not requested such relief on Fleming's behalf. There are rather limited exceptions to raising matters for the first time in this Court. "This Court's usual practice is to decline to address questions raised for the first time here. *See* [*Mendenhall*, 446 U.S. at 551-52, n.5; *Youakim*, 425 U.S. at 234.]" *Lytle*, 494 U.S. at 556-57 (J. O'Connor, concurring).

> The State made no reference to the Hayden-Cartwright Act in the courts of first and second instance. And even though the Court of Appeals flagged the Act's possible relevance [footnote omitted], Oklahoma did not mention this 1936 legislation in its petition for certiorari. Nor is Oklahoma's newly discovered claim of vintage legislative authorization "fairly included" [footnote omitted] in the question the State tendered for our review: "Whether principles of federal pre-emption or Indian sovereignty preclude a State from imposing a tax on motor fuel sold by an Indian tribe . . . . ?" Pet. for Cert. (i). As a court of review, not one of first view, we will entertain issues withheld until merits briefing "'only in the most exceptional cases.'" [*Yee*, 503 U.S. at 535] (citation omitted).

Chickasaw Nation, 515 U.S. at 454-55. The present facts qualify as sufficiently unique to afford a remedy that at least allows Fleming to raise the question of release pending appeal in this Court, since it is at least raised both in the appellate court, (Fleming's Brief, p. 56; Arnold's Ex. 2), and in the original petition here.

M. Fleming's Release Pending Appeal. This incorporates J., *infra*. Count One should never have been charged. The so-called Klein conspiracy is not even statutory. And,

no facts even exist that remotely support *defrauding*. Wrong legal theory, no statute, no facts, wrong parties, self-breaching "plea agreement," misleading jury instruction, sentencing based upon DISMISSED counts, "double taxation," and simultaneous double jeopardy, all clearly demonstrate that there's not one single thing about this case that's "right." Not one. As with Arnold, and all others on appeal from this case, Fleming is properly released pending appeal.

N. Pro Se For All Purposes. If raising release pending appeal is improper in this Court, then this Court's confirmation that Fleming is now *pro se* for all purposes would empower him to engage the normal course regarding this remedy.

Conclusion. Fleming not only should be allowed to proceed *pro se*, but also from his home.

Arnold's Writ

Remedy Requested.

THE RELEASE PENDING APPEAL ISSUE. Arnold requests a writ of mandamus to the warden to release Arnold pending conclusion of the appellate (and any subsequent review) process. Alternatively, Arnold requests a writ to issue to the appellate court to instruct the warden to release Arnold pending conclusion of the appellate (and any subsequent review) process.

THE MOTION TO SEVER ISSUE. This is asserted in anticipation of the need to do so. If the matter becomes moot before this Court issues final ruling on the matter, then it becomes moot. Arnold requests that a writ issue to the appellate court to sever Arnold's appeal from Evans' appeal, with instructions to the court to set a short deadline on any responsive brief intended to be filed.

Overview.

THE RELEASE PENDING APPEAL ISSUE. Count One has neither statutory nor factual basis. It justifies incarceration of no one in this matter.

THE MOTION TO SEVER ISSUE. Arnold will shortly file his motion to sever in the appellate court, and to raise this point here intends to preserve the issue and save an additional filing fee. If this issue becomes moot, then it becomes moot. To preserve the point, this "anticipatory supplement to the original joint petition for mandamus" is included from the outset.

Since Evans' attorney's view of the trial is so radically different from Arnold's, there are quite literally two entirely different cases on appeal. Thus, all of the delays that Evans' attorney has managed to add to Evan's appeal, and thus to Arnold's, should be terminated immediately as to their adverse affect on Arnold. Plaintiff–Appellee should respond to Arnold's Brief now (they've had since November; we're now in March, thus *more than 90 days already*, rather than the traditional 30-day response time). The appellate court is moving Arnold's appeal forward, but at the rate of Evans' case, not Arnold's.

Discussion.

A. In Aid of the Court's Appellate Jurisdiction. The writ would be in aid of this Court's appellate jurisdiction. In light of judicial economy, Arnold's appellate points and Fleming's appellate points are so inextricably intertwined that it truly is impossible to address one without addressing both. One key difference is that Fleming's appeal addresses the self-breaching "plea agreement," (Fleming's Brief, Points 5-15), where Arnold's addresses the faulty instructions to the advisory panel. (Arnold's Brief, Point 7). The indictment points are the same, (Arnold's Brief, Points 1-4; Fleming's Brief, the same), in particular the definition of *defraud*, as well as the "definition" of the Klein conspiracy "crime" charged. And, the sentencing

points are very similar. (Arnold's Brief, Points 8-12; Fleming's Brief, Points 16-19). In addition to these, two points are directly and specifically conjoined, namely the "double taxation" and the "simultaneous double jeopardy" points. (Arnold's Brief, Points 13-16; Fleming's Brief, Points 20-23). Therefore, it's a preservation of judicial economy to hear both. Also, to address both is to aid in the analysis of the remedies each seeks. While the Court discourages piecemeal appeals, the litigants strongly encourage timely mitigation of grave injustice.

B Exceptional Circumstances. Here's the immediate problem. For Fleming, the denial of counsel's motion to withdraw is an effective "death knell" to Fleming's direct appeal. It is, in all practical effects, a "final order." Because Fleming presently has no recognized points raised on appeal, the downstream consequences for any necessary and subsequent § 2254/2255 activity or habeas is also not favorable. Ultimately, where Fleming's points on appeal are not recognized, Arnold is instantly at risk of losing at least two of his points on appeal, meaning that Arnold has a direct and personal stake in any matter that adversely affects Fleming or Fleming's appeal. Thus, the time to raise the points with this Court is now, while there's still time to address and preserve them in the normal course. Also, to see the application of this remedy for one is to see it for both, which not only accentuates the validity of Fleming's appeal, thus the merit in allowing appointed counsel to disembark, but also highlights why there are *so many* points raised on appeal in the first place, thus supporting release pending appeal.

Here's the general problem. *Nothing* about this case, as charged, pled, tried *or* sentenced, justifies *any* loss of liberty for any of the eight defendants in it. Everything is wrong, from applying the wrong legal theory at the outset of formulating the indictment, to sentencing based either on *dismissed charges* and on *charges raised for the first time during sentencing*. Something is fundamentally wrong with a corporate, legislatively created, statutory

commercial enforcement system, or at least this set of its operators, that requires such flagrant violation of all the *other* laws on the books, *especially* Due Process, in order for it even to function. We don't have to like that collection process to see that there are perfectly legitimate ways to run it, *especially* within *full accord* of Due Process. Thus, to encounter such wholesale butchery of that statutory collection process as was utilized here *more than* justifies mandamus. Hopefully, for this type of case, it'll be difficult to find more compelling exceptional circumstances. However, since this non-statutory Klein conspiracy has "justified" loss of liberty for 50 years, *Klein*, 247 F.2d at 910-11 (superceding indictment 17 Sep 1954), based loosely upon a charge of "wrongful *acquisition*" blatantly in the face of the factual and legal impossibility of any "wrongful *acquisition*," should the scenario involved here now be the norm, then addressing this will cure a long-standing national embarrassment.

C. <u>This Court. This Remedy.</u> Regarding available courts, since this problem arises in the appellate court, on direct appeal, there is no alternative forum.

THE RELEASE PENDING APPEAL ISSUE. Relief on rehearing was denied. (App. B–Order (4 Dec 2003)). And, where an individual is wrongfully incarcerated, every day of that wrongful incarceration is a loss of special and unique property interests of time. Thus, where waiting on a final ruling on appeal followed by certiorari would be the normal course, the problems here are so facially obvious that incarceration should never have occurred in the first place, yea, Count One should never have even been tried. Given the present rulings, mandamus follows.

THE MOTION TO SEVER ISSUE. Where the relief is not afforded on appeal, mandamus is the next appropriate remedy.

J. Release Pending Appeal. This concisely addresses only a few of the substantive issues on appeal. Arnold's and Fleming's Briefs and other filings supply the details.

DEFRAUD. In addition to the motion(s), *see* Arnold's Brief, pp. 1-24, 27-35.

What it isn't. One could begin with a definition, but doing so here jumps right passed the critical point. What *is*, matters, but this point focuses on what *cannot possibly be*. Whatever may be the definition of *defraud*, it is rooted in the common law, meaning that the canon applies. *Neder*, 527 U.S. at 22-23; *Carter*, 530 U.S. at 264-67; *Morissette*, 342 U.S. at 250-63, in particular 260-63. Since "embezzlement" is a statutory offense, 3 WHARTON § 383 at 463-65, it follows that *defraud*, in § 371,[3] does not, and cannot possibly, mean, include or refer to "embezzlement."

It's inconceivable how an alleged "income tax evasion" fact pattern could ever sound in anything other than "wrongful detinue," "wrongful *continued* possession," "wrongful conversion," "wrongful failure to pay over," i.e., "embezzlement." Thus, to say that a Klein conspiracy, which is loosely based upon 18 U.S.C. § 371 (defraud), thus specifically tied to and by the term *defraud*, has anything at all to do with an alleged "income tax evasion" fact pattern is nuts.

An affirmative definition of *defraud* is not yet offered, and yet Count One is already rendered pointless. *Defraud* is defined by the common law, which doesn't recognize "embezzlement." Thus, where the sole competent legal theory for the fact pattern is "embezzlement," but where the crime charged depends on a term that cannot possibly mean, include or refer to "embezzlement," the matter is over before it starts. In short, because the charge looks to the wrong legal theory, there's no legitimate basis for anyone's being incarcerated based on it.

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[3] Arnold contrasts *defraud* in various contexts, including student loans, mail and securities. Arnold's Brief, pp. 9-19.

What it is. *Defraud*, as defined by its elements, is this:

(1) *acquisition*
(2) of property (rights)
(3) known by the accused to be property not owned by the accused
(4) by trick or deceit,

the proving of which actus reus typically supplies

(5) the intent to so *acquire* the property wrongfully.

See Bell, 462 U.S. at 358-60 (larceny definitions); *Haas* (exclusive use information); *Morissette* (mens rea, personal property); *Hyde*, 225 U.S. at 350-54 (land).

What § 371 (defraud) does, and *all* that § 371 (defraud) does, is *narrow* element (2), as follows:

(2) of property (rights) *of the United States or an agency thereof.*

So, where's the "wrongful *acquisition*? Whatever a Klein conspiracy is, it's based upon *defraud*, which means it has no competent place in a fact pattern sounding in "embezzlement." Where there's an actual "wrongful *acquisition*," fine; § 371 would apply. But, where we're talking "wrongful *acquisition*," we're no longer talking about "embezzlement." Count One alleged not one penny's worth of property "wrongfully *acquired*." Nothing in the trial (or "plea agreement") even remotely alluded to any property's having been "wrongfully *acquired*." And, *neither* "judgment" orders even one penny's worth of restitution! (2 App. Judgment; 4 App. Judgment). There being nothing "wrongfully *acquired*," as the "judgments" themselves judicially confess, it's legally impossible for property of the United States to have been "wrongfully *acquired*," by anyone, employing any means.[4]

Count One alleged no facts to support *defraud*. No

[4] And, since Plaintiff is the party showing up to assert the charge, one can't help but wonder whether there even exists property of the United States, or any agency thereof, from the threshold.

such facts appear in any "plea agreement." No such facts appear in any trial record. There being no evidence to support *defraud*, Arnold should have been acquitted. Despite the fact *defrauding* was never pled or proved, he was convicted, and presently he's incarcerated. Therefore, he is properly released pending appeal.

NO STATUTE. *See* Arnold's Brief, pp. 27-35.

Another matter as facially obvious as the inapplicability of *defraud* is the complete lack of statutory foundation for this sick joke called a Klein conspiracy. Here's the Klein conspiracy language from Count One (2 App. Indictment, p. 2 ¶ A), identified by its hodgepodge components:

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].

THE LARCENY BY TRICK COMPONENT.

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].

THE ADDED MENS REA COMPONENT

> for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the

IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes.

One may readily find 18 U.S.C. § 371, and one may distinguish between the *defraud* claim and the *violation of United States law* claim just fine. Section 371 isn't the problem. The problem is that the Klein conspiracy only starts with § 371, to which it then adds some IRC § 7201 (both *valuation* and *payment*, which are two completely different offenses), and then some IRC § 7212 (omnibus) (which depends upon "corruptly"), with some *Haas* (and *Hammerschmidt*) thrown in for good measure, which hodgepodge concoction is nowhere produced by any legislative act, but solely by the imagination of the prosecutors exercising the executive authority.

Thus, there's a blatant violation of substantive due process, for there is no statute, thus no notice, no "fair warning." "The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [*Bouie*, 378 U.S. at 351 (quoting *Harriss*, 347 U.S. at 617.)]" *Lanier*, 520 U.S. at 265 and n.5. Each of these opinions analyzes an existing statute. If a charge based on an existing, published legislative act may be vague, and thereby run afoul of the "principle of legality," a charge based on language never enacted legislatively must all the more run roughshod over this principle.

Further, there's an egregious separation of powers problem. A crime is defined, in general, only by legislative act. *Id.*; *Bass*, 404 U.S. at 347-48 (rule of lenity-- (1) common language (2) legislatively enacted). Where the focus in *Bass* distinguishes court-defined crimes from legislatively defined crimes, then with equal validity we may read the thunderous silence regarding the executive to suggest that it doesn't even come to mind to need to be mentioned that the executive doesn't define crimes, at all. Further, where the scope of executive

authority to be exercised under color of law, even under war powers and in a state of emergency, is specifically defined by statute, *Youngstown Sheet & Tube*, the executive acts well beyond the scope of the employment contract to purport to define a crime. Also, the trial court exceeds its statutory authority even to acknowledge as a definition of a crime such language as that dreamed up by the executive.

Joinder may involve quite a bit, *see Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), but it has its limits, and substantive due process supplies one of the most foundational of those limits. There's nothing about joinder that ratifies a separation of powers problem, or an employment contract expansion, which problems the courts should address at the threshold, even *sua sponte* where appropriate. And, doesn't a court challenge its (statutory) limits by permitting the executive to ignore its (statutory) limitations? There must exist a reason why the non-statutory Klein conspiracy hodgepodge has survived for 50 years, and we can but hope that the reason is addressed in this petition. Even in this present state of "object or waive," there are certain challenges to the system's very structure that a defendant (represented or *pro se*) can *never* waive. Way at the top of that list is the objection to the executive's attempt to legislate. *Cruikshank*, 92 U.S. at 556-59 (overbroad indictment; prosecutor to follow, not create, the law; questions of law are for the court, not the prosecutor).

There are certain Due Process rights, substantive and procedural, that the courts are uniquely positioned to protect. The mere infringement or encroachment of separation of powers compels the exercise of the judicial power, *sua sponte* where necessary, within the context of the case or controversy, to curtail any executive's attempt to define a crime. This state represents even a different time, place and plane from the transitions Chief Justice

Marshall witnessed, but surely he's still correct about the commonwealth's inherent authority of self-defense, held in sacred trust, that is the judicial power. *Marbury v. Madison* (the Court is limited *because* the legislature is limited); *Fletcher v. Peck* (state legislative power limited by estoppel); *Dartmouth College v. Woodward* (state legislatures *and* executives derive authority *only* from terms specifically declared). And, if such is not true, i.e., if the judicial power is now powerless to curtail the executive's encroachment into the legislative function, then let it clank and thud from the Old North Church's belfry tower that our "experiment in democracy" has successfully gone the way of all prior experiments of its type, that power exists in the executive to define crimes, i.e., we have successfully become a dictatorship, at long last.

Where the definition of a crime comes solely from legislative acts under color of law, then Klein, himself, never committed a Klein conspiracy. No one has ever committed a Klein conspiracy. There is no such thing as a Klein conspiracy. *This* is what shall ring from the belfry tower of the Old North Church.

"DOUBLE TAXATION" AND SIMULTANEOUS DOUBLE JEOPARDY. Arnold's Brief, pp. 53-61; Fleming's Brief, pp. 31-42.

The "gross income" is that of an entity.[5] It is not that of any individual. For fiduciary year 1996, claims are charged first against 100% of the business entity's "income" in Fleming's name, and then again for *another 75%* of that exact same business entity's "income," in Arnold's name. (App. B.–Affidavit, Numerics). Hence, the "double taxation." *Cf. Kurth Ranch*, 511 U.S. at.790-93 (punitive tax).

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[5] Actually, it's a pile of deliberately and falsely bolstered craftily shifted numerics commingled by the prosecution from various entities and obligations solely for purposes of this litigation, but the singular of "entity" is used for clarity.

The entity, as agent for its equitable interest owners, suffers, then, a double risk of loss of property, regarding the same offence in the same indictment, one loss in the name of each of (at least) two alleged agents of the entity. Therefore, the equitable interest holders suffer a simultaneous double jeopardy of their property, which, because there is no way to determine which of the risks of property is first in time, compels the abrogation of both claims and, thus, of both judgments.

Such problem is remedied by having a clue from the outset as to which party is the true party in interest. Where that party is an entity, then one first proves up that entity's alleged liability; secondly, one transfers that entity's liability to an alleged "responsible party." It's not rocket science, but it does help to have read at least a line or two of the Tax Code before slinging criminal charges all around.

The prosecution's approach here was to annihilate the business entity fiduciary, to commingle all the property, and to assert that the business' "income" was really an individual's all along, except where it was convenient to "double up" that income, attributing it to (at least) two people, in the nature of "check kiting," except rather than checks, we're talking about a "commingled trust *res*;" hence "commingled trust *res*" kiting.[6] Since the sole criminal complaint against the entity would have been that of failure to honor the alleged fiduciary obligation, annihilating the business entity fiduciary is so inconsistent with acceptance of the benefit as to trigger disclaimer instantly, *see* BOGERT §§ 170-72 (disclaimer and its effect) (in particular at 205-07), which just as instantly abrogated the entirety of the claims from the threshold, for all involved, for all years involved.

Arnold, as simply one of several, is properly released pending appeal.

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[6] And, fraud on the court.

K. Severance. Arnold is directly strapped to whatever Evans's attorney is or isn't doing with Evans' brief. To read the two briefs (Arnold's and Evans') is to reflect upon two of the six blind men trying to describe the elephant, one seeing the heart; another examining the tail. In short, the two parties who suffered the same "trial" are now actually dealing with two entirely different cases (on appeal). Thus, it is inequitable to hamstring Arnold with the adverse timing and scheduling consequences at Evans' attorney's hand of what now amounts to a completely different case (on appeal) that just happens to arise from the same "trial."

Plaintiff–Appellee has had since November to respond to Arnold's brief. Due to the stalls initiated on behalf of Evans and now additional time delays, still no response is due on Arnold's Brief. Where it was originally sensible to couple those cases in one appeal, it is now impractical and inequitable to Arnold to maintain that course.

Arnold's appeal is properly severed from Evans'.

Conclusion.

Arnold should be released pending appeal, and his appeal should be severed from Evans'.

Mandamus Remedies Requested.

1. In general, remove appointed counsel from Fleming's case. Either allow Fleming to proceed *pro se*, or appoint substitute counsel. But, in any event, grant appointed counsel's second motion to withdraw, while allowing this case to continue in the normal course.

2. In general, release Arnold pending appeal.

3. Because it's the exact same set of issues for Fleming, release Fleming pending appeal. Through absolutely no fault of his own, Fleming has yet to have filed for him the traditional motion at the trial level, but under

these circumstances, that initial procedural requirement should be considered satisfied, and such issue properly before the appellate court and, thus, this Court.

4. Issue a rule to show cause why mandamus should not issue (A) to the appellate court to the effect that appointed' counsel's second motion to withdraw be GRANTED, under an exception to the general rule of *Anders* that allows Fleming to continue *pro se*, or (B) to the clerk of the appellate court (1) to recognize Fleming's First Amended Notice of Appeal as a correction to the original Notice that obviously contained a clerical error (absence of sufficient specificity of intent to proceed *pro se*), thus allowing Fleming to proceed *pro se*, or (2) to allow as filed Fleming's waiver of representation on this direct appeal, subject, of course, to the normal course of the appellate court's evaluation of Fleming's qualified right to proceed *pro se*, as heavily guided by the trial court's determination that Fleming certainly qualified, thus eventually allowing Fleming to proceed *pro se*. Additionally, issue a rule to show cause why mandamus should not issue (C) to the warden of the facility in Mississippi to release Arnold pending appeal, and (D) to the warden of the facility in Georgia to release Fleming pending appeal.

5. In general, sever Arnold's appeal from Evans'.

<u>Related Remedies.</u>

6. Where the Court may identify additional issues that should be briefed for this matter, leave to file such supplemental brief is requested.

7. Per Rule 14.5, if there are any formatting matters that may be remedied via an amended filing, then leave for such amendment is requested.

8. If there are additional matters properly included in any Appendix, leave to amend or supplement the Appendix is requested.

9. Where there is an objection to service regarding this proceeding, time is requested to make proper service.

10. To expedite all matters, no oral argument is requested.

11. Tax costs to Respondent, thus reimburse Petitioners for costs and out of pocket expenses for this proceeding.

12. Petitioners request any and all other relief in equity to which Petitioners may show themselves justly entitled.

Respectfully submitted,

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